

**Office of Chief Counsel  
Internal Revenue Service**

**memorandum**

CC:LM:FSH:MAN:4:TL-N-7223-00

SDTillem

date:

to: Director of Field Operations, Financial Services and Healthcare  
Territory 1110

Attn: Laurie Gononsky, Revenue Agent, LMSB, Group 1108

from: Area Counsel (FS&H:Man)

subject:

EIN: [REDACTED]

Taxable Year [REDACTED]

Consent to Extend the Statute of Limitations on Assessments  
and Power of Attorney

U.I.L. #: 6501.08-00; 6501.08-17

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicate in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

This advice relies on facts provided by you to our office. If you find that any facts are incorrect, please advise us immediately so that we may modify and correct this advice. This advice is subject to 10-day post review by the National Office. CCDM 35.3.19.4. Accordingly, we request that you do not act on this advice until we have advised you of the National Office's comments, if any, concerning this advice.

This memorandum is in response to your request for advice concerning the proper language for the Form 872, Consent to Extend the Statute of Limitations on Assessment, ("Form 872") and power of attorney in connection with the [REDACTED] taxable year of [REDACTED] (" [REDACTED] ")

The statute of limitations on assessment for the [REDACTED] taxable year is currently set to expire on [REDACTED].

ISSUES

1. What specific language should be used on the consent to extend the statute of limitations on assessment for the taxpayer, [REDACTED] for the taxable year [REDACTED].

2. What language should be used on a power of attorney with respect to [REDACTED] for the taxable year [REDACTED].

CONCLUSION

1. We recommend the following language be used on the Form 872 for [REDACTED] for taxable year [REDACTED]:

- captioning the Form 872 as follows:

[REDACTED] (E.I.N. [REDACTED]), as alternative agent for [REDACTED] consolidated return group, pursuant to Temp. Treas. Reg. § 1.1502-77T, and as successor in interest to, by way of merger with [REDACTED] (E.I.N. [REDACTED]) \*

- inserting language at the bottom page of the Form 872 as follows:

\*This is with respect to the consolidated tax liability of [REDACTED] consolidated group for the taxable year [REDACTED].

- securing the signature of an authorized officer of [REDACTED] on the signature block of Form 872 and noting on the signature block on page 2 of Form 872 as follows:

[name of current officer]

[title of officer]

\_\_\_\_\_,  
successor in interest to \_\_\_\_\_  
\_\_\_\_\_.

- inputting the E.I.N. of \_\_\_\_\_  
\_\_\_\_\_ in the box on the Form 872  
labeled "SSN or EIN".
- confirming that \_\_\_\_\_  
\_\_\_\_\_ is still in existence when the  
Form 872 is secured from this entity.

2. The same language that was suggested above for use on the Form 872 should be used on any power of attorney with respect to the income tax liabilities of \_\_\_\_\_ for taxable year \_\_\_\_\_.

FACTS

Revenue Agent Laurie Gononsky has requested that the taxpayer, \_\_\_\_\_ (EIN: \_\_\_\_\_) execute a Form 872 to extend the time within which to assess its Form 1120 corporate income tax liability for taxable year \_\_\_\_\_. The statutory period for assessment of the Form 1120 corporate income tax liability terminates \_\_\_\_\_.

For the taxable year \_\_\_\_\_, \_\_\_\_\_ was the common parent of a subsidiary corporation, \_\_\_\_\_ (EIN: \_\_\_\_\_) and filed a consolidated U.S. Corporate Income Tax Return (Form 1120) with its subsidiary.

On or about \_\_\_\_\_, the following parties entered into an Agreement and Plan of Merger ("Merger Agreement"):

1. \_\_\_\_\_ ("\_\_\_\_\_")
2. \_\_\_\_\_ ("\_\_\_\_\_")
3. \_\_\_\_\_ ("\_\_\_\_\_")
4. \_\_\_\_\_ ("\_\_\_\_\_")
5. \_\_\_\_\_ (\_\_\_\_\_).

\_\_\_\_\_ and \_\_\_\_\_ are \_\_\_\_\_  
\_\_\_\_\_ is the sole member of \_\_\_\_\_ and \_\_\_\_\_ and  
\_\_\_\_\_ are corporations organized under the Not-for-Profit  
Corporation Law of the State of New York.

There were two phases of the merger consisting of (1) Initial Mergers and (2) Secondary Merger as follows:

(1) Under the Initial Mergers:

(a) [REDACTED] was merged with and into [REDACTED]. The separate existence of [REDACTED] ceased and [REDACTED] is the surviving corporation. Merger Agreement ¶ 1.1(a).

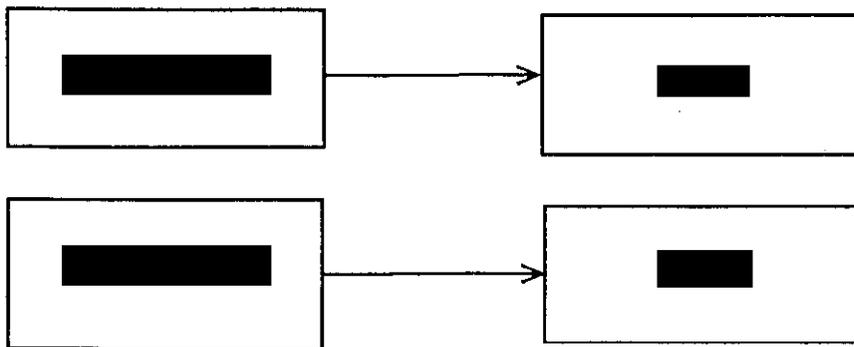
(b) [REDACTED] was merged with and into [REDACTED]. The separate existence of [REDACTED] ceased and [REDACTED] is the surviving corporation. Merger Agreement ¶ 1.1(b).

(2) Under the Secondary Merger:

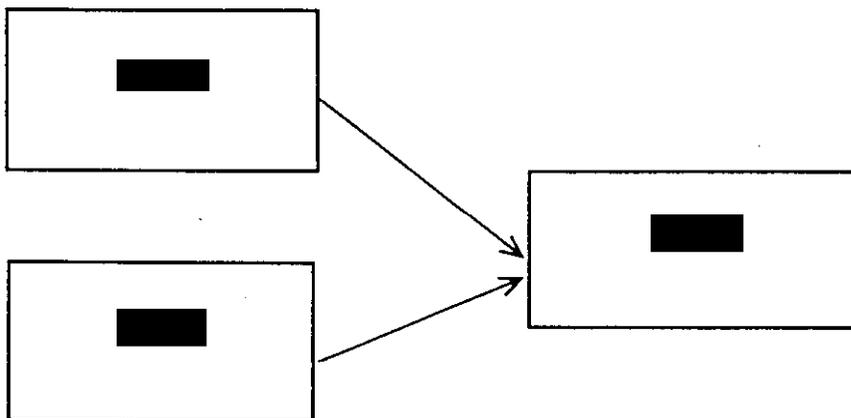
[REDACTED] and [REDACTED] were merged into [REDACTED]. The separate existence of [REDACTED] and [REDACTED] ceased. [REDACTED] is the surviving corporation. Merger Agreement ¶ 2.1.

In summary the parties agreed to the following mergers:

Initial Mergers



Secondary Merger



**DISCUSSION**

In general, the statute of limitations on assessment expires three years from the date the tax return for such tax is filed. I.R.C. § 6501(a). Section 6501(c)(4), however, provides an exception to the general three year statute of limitations on assessment. In accordance with this exception, the Secretary and the taxpayer may consent in writing to an agreement to extend the statute of limitations on assessment of any tax except estate tax. The Form 872 ("Consent to Extend the Time to Assess Tax") is used by the Service to extend the statute of limitations on assessment.

In the case of a consolidated group, guidance as to the appropriate entity to enter into a consent to extend the statute of limitations on assessment can be found in the consolidated return regulations. Treas. Regs. § 1.1502-1 et seq. The consolidated return regulations provides three rules for determining which corporation has authority to act in matters relating to the tax liability of a common parent of a consolidated group that ceases to exist: (1) an entity designated by the old common parent can act as agent for the members of the group; or (2) if the old common parent fails to make such a designation, the surviving members of the old group can designate an agent; or (3) if neither the old parent nor the surviving members make such a designation, the Service may deal with the old group members on an individual basis.

Based upon the information provided no designation of an agent within the scope of Treas. Reg. § 1.1502-77(d) has been made. Accordingly, the Service may deal with the old group members on an individual basis. This may not be administratively practical, however, if there is no one left to contact from the old group members.

Temp. Reg. § 1.1502-77T, which was promulgated in 1988 by the Service to supplement Treas. Reg. § 1.1502-77, modifies the "exclusive agent" rule of Treas. Reg. § 1.1502-77(a)<sup>1</sup>. Treas. Reg.

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<sup>1</sup> Temp. Reg. § 1.1502-77T is effective for taxable years for which the due date (without extensions) for filing the consolidated return is after September 7, 1988. Temp. Reg. § 1.1502-77T(b). Simultaneous with the promulgation of the temporary regulation, the Service amended Treas. Reg. § 1.1502-77 by adding paragraph (e), cross referencing to Temp. Reg. § 1.1502-77T.

§ 1.1502-77T<sup>2</sup>, provides alternative agents for the purpose of extending the statute when the common parent of a group ceases to be a common parent. Under this provision, a waiver obtained from any one of several alternative agents is deemed to be given by the agent of the group. Temp. Treas. Reg. § 1.1502-77T(a)(3). The alternative agents are as follows:

(i) The common parent of the group for all or any part of the year to which the notice or waiver applies;

(ii) A successor to the former common parent in a transaction to which section 381(a) applies;

(iii) The agent designated by the group under Treas. Reg. § 1.1502-77(d);

(iv) If the group remains in existence under § 1.1502-75(d)(2) or (3) ("reverse acquisition"), the common parent of the group at the time the waiver is given.

In the subject case, subparagraph (a)(4)(a)(i) does not apply because [REDACTED] (EIN: [REDACTED]) is no longer in existence. Likewise, subparagraph (a)(4)(iii) does not apply because no agent has been designated by the group. It is also unclear, whether subparagraph (a)(4)(iv) would apply because there are insufficient facts concerning whether the merger constitutes a reverse acquisition within the meaning of Treas. Reg. § 1.1502-75(d)(3). However, we believe that subparagraph (a)(4)(ii) applies since section 381(a) applies to the subject transaction.

Section 381(a) applies, in part, to an acquisition of assets of a corporation by another corporation in a transfer to which section 368 applies, but only if the transfer is in connection with a reorganization described in subparagraph (A), (C), (D), (F) or (G) of section 368(a)(1). If section 381(a) applies, [REDACTED] would be an alternative agent for [REDACTED] pursuant to Temp. Treas. Reg. § 1.1502-77T(a)(4)(ii) for the tax year [REDACTED].

The parties to the merger claim that the merger qualifies as a tax-free reorganization under section 368(a)(1)(A). To qualify as a tax-free reorganization under section 368(a)(1)(A), the

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<sup>2</sup> According to the Federal Register: The alternative agent approach of the temporary regulation continues to apply for purposes of executing waivers of periods of limitations on assessment for years beginning before the date final regulations are published in the Federal Register. To date no such final regulations have been published.

following requirements must be met. First, the transaction must be structured as a Type A, C, D, F or G reorganization. I.R.C. § 368(a)(1). Second, the restructuring must have been pursuant to a plan of reorganization. I.R.C. §§ 354 and 361. Third, there must be a business purpose for the reorganization. Gregory v. Helvering, 293 U.S. 465 (1935); Treas. Reg. § 1.368-1(b). Fourth, there must be continuity of business enterprise. Treas. Reg. § 1.368-1(d). Finally, there must be continuity of proprietary interest. Treas. Reg. § 1.368-1(e).

In the subject case, it appears that the above requirements have been met. First, the merger appears to have been structured as a Type A reorganization whereby [REDACTED] merged into [REDACTED] and all its outstanding stock was cancelled. Second, the restructuring was pursuant to a plan of reorganization as evidenced by the Merger Agreement. Third, the Merger Agreement makes clear that the business purpose of the reorganization is to carry on the [REDACTED]. Fourth, there appears to be continuity of business enterprise since the Merger Agreement provides that [REDACTED]: shall possess all the rights, privileges, immunities, powers, purposes, properties and assets of [REDACTED] and shall assume all the liabilities and obligations of [REDACTED]. Merger Agreement § 2.3. Finally, the continuity of proprietary interest requirement is satisfied since the equity interests in [REDACTED] were exchanged for equity interest in [REDACTED] under the Merger Agreement.

In view of the above, the merger appears to be a reorganization within the meaning of section 368(a)(1)(A). Therefore, [REDACTED] would be the successor to [REDACTED] in a transaction to which section 381 applies. [REDACTED] would then be an alternative agent for [REDACTED] for purposes of entering into an agreement to extend the statute of limitations on assessment for the [REDACTED] consolidated tax return for the taxable year [REDACTED], pursuant to Temp. Treas. Reg. § 1.1502-77T(a)(4)(ii).

The regulations under section 6501(c)(4) do not specify who may sign consents to extend the statute of limitations for income tax. Accordingly, the rules applicable to the execution of an original return have been deemed to apply to the execution of a consent to extend the time to make an assessment. Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

In the case of a corporate return, section 6062 provides that a corporation's income tax returns must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer, officer or any other officer duly authorized to act. Since the rules applicable to the execution of an original return also apply to a consent to extend the statute of

limitations, any such consent may be signed by the above-noted individuals. Rev. Rul. 84-165. Thus, in the subject case, any officer of [REDACTED] of the type set forth in section 6062 may sign the consent.

Based on our legal analysis, we recommend:

- captioning the Form 872 as follows:

[REDACTED] (E.I.N. [REDACTED]), as alternative agent for [REDACTED] consolidated return group, pursuant to Temp. Treas. Reg. § 1.1502-77T, and as successor in interest to, by way of merger with [REDACTED] (E.I.N. [REDACTED])\*

- inserting language at the bottom page of the Form 872 as follows:

\*This is with respect to the consolidated tax liability of [REDACTED] consolidated group for the taxable year [REDACTED].

- securing the signature of an authorized officer of [REDACTED] on the signature block of Form 872 and noting on the signature block on page 2 of Form 872 as follows:

[name of current officer]

[title of officer]

[REDACTED]  
successor in interest to [REDACTED].

- inputting the E.I.N. of [REDACTED] in the box on the Form 872 labeled "SSN or EIN".
- confirming that [REDACTED] is still in existence when the Form 872 is secured from this entity.

Additionally, at the time Form 872 is presented to the taxpayer for execution, please notify the taxpayer that the taxpayer may (1) refuse to extend the period of limitations or (2) limit the extension to particular issues or to a particular period of time. I.R.C. § 6501(c)(4)(B). The statutory notice requirement under I.R.C. 6501(c)(4)(B) generally applies to

requests to extend the period of limitations made after December 31, 1999.

If you have not yet done so, we recommend that you verify the EINs of the respective corporations to be shown on all of these Forms. If any change(s) in EINs occurred as a result of the transactions discussed herein, such change(s) should be reflected on the forms.

Please also note that IRM 121.2.22.3 requires use of Letter 907(DO) to solicit the Form 872, and IRM 121.2.22.4.2 requires use of Letter 929(DO) to return the signed Form 872 to the taxpayer. Dated copies of both letters should be retained in the case file as directed. When the signed Form 872 is received from the taxpayer the responsible manager should promptly sign and date it in accordance with Treas. Reg. § 301.6501(c)-1(d) and IRM 121.2.22.3. The manager must also update the statute of limitations in the continuous case management statute control file and properly annotate Form 895 or equivalent. See IRM 4531.2 and 4534. This includes Form 5348. In the event a Form 872 becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

#### Issue 2.

Pursuant to Treas. Reg. § 601.504(b)(i)(iv), in the case of a corporation, a power of attorney must be executed "by an officer of the corporation having authority to bind the corporation, who shall certify that he or she has such authority." Hence, it follows that any officer of [REDACTED] may sign the power of attorney for [REDACTED], providing that whomever signs also certifies that he or she has such responsibility.

The same language that was suggested above for use on the Form 872 should be used on any power of attorney with respect to the income tax liabilities of [REDACTED] for taxable year [REDACTED].

If you have any questions concerning the advice provided in this memorandum, please contact Steven Tillem (212) 264-5473.

ROLAND BARRAL  
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By: \_\_\_\_\_  
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